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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-225

BARTHOLOMEW MANDEL &
HARRY THOMAS,

Petitioners,

v.

MARTIN R. HOFFMANN,
Secretary of the Army,
and
ROBERT E. HAMPTON,
Chairman, CIVIL SERVICE
COMMISSION, Constituting
THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS for the District of Columbia Circuit

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COMMISSION, Constituting
THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS for the District of Columbia Circuit

Petitioners request that a Writ of Certiorari be issued to review the judgment and Memorandum of the United States Court of Appeals for the Columbia Circuit affirming the judgments of the United States District Court for the Columbia Circuit and the Civil Service Commission.

OPINION BELOW

The order of the Court of Appeals denying appellants' petition for a rehearing filed April 21, 1977, is included in the Appendix at p.23.

The opinion of the Court of Appeals is included in the Appendix at pp.24-28.

The order judgment of the United States District Court (Columbia) is included in the Appendix at p. 29.

The opinions of the Civil Service Commission (Mandel and Thomas) are included in the Appendix at pp. 40-48 and 49-57 respectively.

JURISDICTION

The date of entry of Judgment of the United States Court of Appeals for the Columbia Circuit was March 23, 1977.

The order of the Court of Appeals denying appellants' petition for a rehearing filed April 21, 1977, is included in the Appendix at p.23.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. In the Federal Service, under civil service statutes (Title 5 U.S.C.) can professional mechanical engineers (petitioners) be lawfully discharged for alleged inefficiency in their profession

solely by reason of the mere allegations of their layman supervisor who does not meet the qualification standards set forth for his position, and who does not have the credentials to make allegations in the profession of mechanical engineering? Lacking supporting competent professional opinion or testimony, can a Government Agency, the Civil Service Commission, or the courts lawfully rule as to the inefficiency of professional employees (petitioners) in their profession in the Federal Service?

II. In the Federal Service, where the record shows the Performance Rating Act, 5 U.S.C. 4301 et. seq. was invoked to discharge petitioners, are the discharges lawful when petitioners were denied under the same Performance Rating Act their Constitutional fifth and fourteenth amendment right to defend themselves? Are the lower court's decisions based on res judicata valid?

III. In the Federal Service, where the record shows that the Performance Rating Act, 5 U.S.C. 4301 et. seq. was invoked to discharge petitioners, was it cruel and unusual punishment to discharge petitioners in all engineering positions, a punishment far beyond the law, in view of the fact that petitioners could have been demoted to the next lower position in which they held seniority and qualification and where no allegations of inefficiency exist whatsoever ?

STATEMENT OF THE CASE

This case arises from the discharges of petitioners Mandel and Thomas from the Federal Service on May 23 and July 20, 1973, respectively.

Petitioners Mandel and Thomas started their careers in Mechanical Engineering during the depths of the depression days of the 30's. Both owe their starts to hard-earned scholarships and job income during their high school years. Both went on to establish careers of some 30-plus years of satisfactory service in their chosen field. Both performed satisfactorily (with commendations) for some 17 years in the Federal Service at positions GS-13 and GS-12.

Mandel distinguished himself by honorable service as an officer in the United States Navy for more than 4 years in battle areas in World War II and the Korean War. Mandel is also a professional registered mechanical engineer in the State of Michigan (certification #11716).

Thomas distinguished himself by serving as chief engine test engineer for American Motors Corp. Special Products Division (1954-1957), and the United States Tank-Automotive Command (USATACOM) (1960-1968).

Petitioners Mandel's and Thomas' careers were without blemish up to January 1, 1972. Shortly before 1972, Joseph O. Nouse, the officer who discharged petitioners, was appointed by defendant agency USATACOM as petitioners' supervisor (approximately October 15, 1971).

On January 1, 1972, almost immediately after his questionable appointment as supervisor, Nouse illegally purported that petitioners job performances as Mechanical Engineer, GS-13, were allegedly inefficient. Nouse at this very moment was in violation of the law, 5 U.S.C. 4301 et. seq., simply by the fact of his non-existent performance-rating plan which in no way was approved by the Civil Service Commission; these unlawful acts denied petitioners their constitutional fifth and fourteenth ammendment rights to defend themselves under this law. Further, under 5 U.S.C. 4305, Nouse, the Agency, and other Army officials conspired to deny petitioners their constitutional rights, to wit: to defend themselves under the law, to prove their proficiency as Mechanical Engineers, GS-13, to disprove their alleged inefficiency as Mechanical Engineers, GS-13, to prove Nouse's incompetence in the profession of mechanical engineering or any other field of engineering or science, to prove Nouse did not meet the standards for his job as cited by the CSC under the classification and qualification statutes (5 U.S C. 5101 et. seq.), to prove the illegality of Nouse's performance-rating plans, to expose and prove the incompetence and corruption that existed at USATACOM, to prove Nouse's charges or allegations are not substancial evidence, to prove petitioners contribution to the efficiency and economy of the Federal Service to the extent of many many millions of dollars and the rejection of cost ineffective money-consuming Army "white elephant",

boondoggle projects such as those cited by Nouse in his charges.

Nouse subsequently (October 12, 1972) filed a 90-day warning letter and charges of purported inefficiency which led to the discharges of Mandel and Thomas on May 23 and July 20, 1973, respectively. However, in the warning, Nouse prejudged petitioners by stating, "As with several of the problems, more than 90 days will be required (to improve petitioners performance)". Nouse's words show that he had no intent to conform to the law, and expose his motives to be arbitrary.

None of the claims above were litigated in any prior court. The U.S. District Court in Michigan as supported by the Sixth Circuit Appeals Court dismissed the claims "without prejudice to his (petitioners) bringing a new action after exhaustion of administrative remedies" (App. 64). The instant case is the "new action" and administrative remedies have been exhausted.

The Civil Service Commission confirmed the agency's lawlessness, supra, not to comply with provisions of the law 5 U.S.C. 4301 et. seq. and 5101 et seq. and the agency's denial to afford petitioners their constitutional rights to defend themselves under this law. After confirmation of the above lawlessness, the Civil Service Commission arbitrarily dismissed the claims, on grounds that the validity of Nouse's illegal performance-rating plans under the law were not pertinent to the case despite the fact that they were embodied in the record to discharge petitioners according to

Nouse's statement, to wit:

> "The charges against Mandel are based upon his inefficiency and failure to perform in accordance with his job standards (performance requirements) (5 U.S.C. 4302-4) for his position as a GS-13 Mechanical Engineer."

Lacking the credentials and proof thereof in the record to support competence in mechanical engineering (despite the fact that the burdon of proof is upon him to do so), Nouse's allegations in the record in mechanical engineering do not constitute substantial evidence under 5 U.S.C. 706 and therefore the charges are unsupported. Nouse is simply a layman.

The Columbia District Court arbitrarily dismissed the claims on grounds unknown, since no supporting memorandum was rendered.

The Columbia Circuit Court of Appeals arbitrarily and erroneously dismissed the claims, on the basis of res judicata which they did not prove. How could the Columbia Circuit prove their res judicata dismissal when the claims in the lower court were dismissed "without prejudice to his bringing a new action after exhaustion of administrative remedies." (App. pp. 58-66)? The instant case is the "new action" and administrative remedies have been exhausted.

In summary, Nouse, the charging officer whose proof of credentials and competence in the profession of mechanical engineering or any other field of engineering or science as is required by the qualification and classification

statutes are lacking in the record and whose allegations in the record therefore lack substantiality, by his charges and admissions in the record invoked the law 5 U.S.C. 4301 et. seq. to discharge petitioners.

The record demonstrates that Nouse committed acts in violation of the law, and thus was lawless and arbitrary. These lawless acts denied petitioners their constitutional fifth and fourteenth ammendment rights to defend themselves under the law. The record demonstrates that the Civil Service Commission confirmed Nouse's lawlessness and used these lawless acts to support the agency's failure to comply with the law; thus demonstrating that the Civil Service Commission was arbitrary and lawless. The climax of injustice comes as the lower courts support the lawlessness with their decisions and finally swept the case into history with a res judicata dismissal which has no proof and cannot be proved. By their decisions, the lower courts condone Nouse's lawlessness and therefore become lawless and arbitrary.

Are petitioners to believe that they are given equal justice under the law, as is their right in a principled judicary, when the lower court, coupled with their judges support and condone lawlessness and incompetence in the Army? This is a cruel and inhumane form of injustice played upon petitioners by Nouse, the agency, the Civil Service Commission, and now by the courts. It is a creeping form of tyranny that will destroy what was created in 1776 by the founding fathers.

1. Facts Relating to Question I, supra.

a. The only evidence in the case against petitioners is a voluminous set of papers entered into the record by supervisor Nouse. In summary, the papers comprise mere allegations of Nouse as to the inefficiency of petitioners and are supported by a voluminous hodge-podge of miscellaneous progress reports, rough drafts, etc. written by the petitioners. None of the final work of petitioners is included in the record. Many important and significant studies of petitioners were purposely and prejudically missing from the record. Not one of the papers was evaluated by a qualified Mechanical Engineer!

b. There is no evidence in the record that Nouse is a Mechanical Engineer. Nouse alleges to be an economist. The Civil Service Commission in its final decision concluded that "Further although appellant is a Mechanical Engineer (Mandel and Thomas) and his supervisor (Nouse) is not..." (See Appendix, p. 47). Yet, Nouse's Job Description as based on Civil Service Classification and Qualification Standards established for his position requires that he be well-versed in the advanced state-of-the-art theory in Mechanical Engineering as well as several other fields of engineering and science (See Appendix 67-74). There is no evidence in the record to prove that Nouse conforms to these standards or that he has the credentials to make allegations in the professions of engineering and science.

c. The following case is cited:

> "Airman who was wrongfully discharged from Air Force on allegations of homosexuality was entitled to recover active duty pay and allowances for the period from his invalid discharge to end of his then enlistment..." Bray v. United States, 515 F. 2d 1383, U.S. Ct. of Claims (1975) (Emphasis added).

Similarly in the instant case, defendants have set forth mere incompetant allegations as to the inefficiency of plaintiffs in the field of mechanical engineering and hence have failed to assume the burden of proof required to support the charges.

d. Yet, the record submitted by respondents in support of the charges does not contain one iota of testimony by a qualified engineer. Nouse, the charging officer, is not qualified in mechanical engineering. Neither did the Civil Service Commission or the courts below call on any expert in mechanical engineering to evaluate the voluminous set of papers submitted as evidence. None of the reviewing agencies, supra, commented on a single one of the papers in the record!

e. Clearly, there is no expert evidence or testimony in the case against the petitioners.

2. Facts Relating to Question II, supra

a. In all their appeals, petitioners emphasized the fact that they were not recognized by respondents as bona fide civil service employees under the

Performance Rating Act (5 U.S.C. 4301 et seq), and the Classification Act (5 U.S.C. 5101 et seq). Petitioners were denied their rights to have their work assigned, guided, and evaluated by a competant supervisor qualified under the Classification and Qualification Standards as established by the Civil Service Commission under 5 U.S.C. 5101 et seq.

b. First, respondents have alleged that petitioners were inefficient during the period of Jan. 1, 1972 to Jan. 31, 1973.

c. However, as of Jan. 1, 1972, respondents did not have a performance rating plan by which their work could be judged although Statute 5 U.S.C. 4302 clearly states that "For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal Service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees." (App. p. 17).

d. Further, during the alleged inefficiency period of Jan. 1972 to Jan. 1973 period, petitioners were not granted ratings of their performances, although 5 U.S.C. 4303 (5) clearly states "that each employee be kept currently advised of his performance and promptly notified of his performance rating." (App. p.18).

e. Further, petitioners were denied a review of their ratings as was their right under 5 U.S.C. 4305 during the Jan. 1972 to Jan. 1973 period. This denial by the Agency was based on the fact that petitioners had no current rating and therefore review was impossible! (App. p.19).

f. In a belated and invalid performance rating plan established on April 21, 1972, the supervisor (Nouse), under the rating element of "Quantity and Timeliness (of work performance)" specified that petitioners were "expected to produce results in quantity in accordance with priorities and schedules imposed by supervisor." This is an indeterminate catch-all yardstick of performance which permits the supervisor unlimited discretion to evaluate quantity of work by whim or fancy. No defense is possible when the supervisor charges an employee with failure to produce work in sufficient "quantity".

g. Respondents have raised the question of res judicata, citing prior cases. All of the prior cases were dismissed on the issues of (1) pretermination hearing, (2) executive immunity and (3) primary jurisdiction. No other issue was adjudicated. None of the above issues are included in the present case. Respondents and the courts below have failed to prove otherwise. The U.S. District Court in Michigan as supported by the Sixth Circuit U.S. Court of Appeals dismissed the claims, "without prejudice to his bringing a new action after exhaustion of administrative remedies."(App.58-66). The instant case is the "new case" and administrative remedies have been exhausted. The question of res judicata is without support and is a fabrication.

3. Facts relating to Question III, supra:

a. Petitioners hold records of

satisfactory job performances both at the GS-12 and GS-13 positions as mechanical engineers at the United States Army Tank-Automotive Command for some 15 years.

b. At the time of their discharges they were GS-13 Mechanical Engineers.

c. Although they do not plead guilty to the charges at the GS-13 position, petitioners contend that the penalty of complete discharge was cruel and unusual punishment within the meaning of Article VIII of the Constitution.

d. No evidence in the record demonstrates that petitioners would be inefficient at the GS-12 position. By his admission in the record, the charging officer invoked the law, 5 U.S.C. 4301, et. seq., to discharge petitioners. The law 5 U.S.C. 4304(b) clearly states, "A performance-rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory." Petitioners contend that it was cruel and unusual punishment to be removed from all positions when only "failure to perform as a GS-13 mechanical engineer" was alleged in the record.

e. The penalty, although still unjust, should have been limited to demotion to the GS-12 position.

f. The complete discharges have virtually ended the unblemished 30-year plus careers of petitioners, considering their age (over 55) and the reason for discharge. This clearly constitutes cruel and unusual punishment.

FEDERAL JURISDICTION IN THE COURT OF THE FIRST INSTANCE

The jurisdiction of the court of first instance, the U.S. District Court for the district of Columbia arose under 28 U.S.C. 1331, 1361, 1391, 2201, and 2202, and 5 U.S.C. 551-559, 701-706, 4301 et seq., 5101 et seq., 5596, and 7501, Ex Ord. 11491 Sec. 22, and U.S. Constitutional Amendments I, V, and XIV.

REASONS FOR GRANTING THIS WRIT

This case presents the most compelling reasons for allowing the writ. The reviewing agencies, including the Civil Service Commission and the lower courts, contrary to basic judicial procedure, have based their decisions on:

1. the mere allegations of a supervisor who evidently does not meet the qualification requirements of his position.

2. the mere allegations of a supervisor who denied petitioners all of their rights under the Performance Rating Act (5 U.S.C. 4301 et seq.) prior to discharge.

3. the unproven issue of res judicata.

4. the belief that petitioners alleged inefficiency, demanded the maximum penalty of complete discharge when the less cruel punishment of a demotion to GS-12 position was available.

5. on the contention that petitioners failed to provide proof of their proficiency in mechanical engineering.

This is in opposition to prior law which assumes that the accused are innocent unless proven guilty. The burden of proof is on respondents. Further, respondents denied petitioners their Constitutional and statutory rights to prove their proficiency and to take to the merits any and all claims related to law 5 U.S.C. 4301 et. seq.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals. It is of vital interest to justice and the continuance of the Civil Service Merit System and hence is of significant importance to the public welfare.

Respectfully submitted,

/s/

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/s/

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DATED: July 8, 1977

APPENDIX

Constitutional and Statutory Provisions Involved in the Case

1. United States Constitution Amendment I:

> "Congress shall make no law respecting...the freedom of speech.."

2. United States Constitution, Amendment V:

> "No person shall be...deprived of life, liberty, or property, without due process of law:..."

2A. United States Constitution, Amendment VIII:

> "Excessive bail shall not be required...nor cruel and unusual punishments inflicted."

3. United States Constitution Amendment XIV: Section I:

> "No State shall...deny to any person within its jurisdiction the equal protection of the laws." (Applicable to the Federal Government by stare decisis.)

4. Performance Rating Act of September 30, 1950 (pp. 274-276, 1970 Edition of U.S.C., 5 U.S.C. 4301 et.seq.)

4302. Performance-rating plans; establishment of.

"For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees."

4303. Performance-rating plans; requirements for.

"Each performance-rating plan shall be as simple as possible and shall provide--

(I) that performance requirements be made known to all employees;

(2) that performance of the employee be fairly appraised in relation to the requirements;

(3) for use of appraisals to improve employee performance;

(4) for strengthening supervisor-employee relationships; and

(5) that each employee be kept currently advised of his performance and promptly notified of his performance rating."

4304. Ratings for performance.

(a) "Each performance-rating plan shall provide for ratings representing at least--

(I) satisfactory performance;
(2) unsatisfactory performance; and
(3) outstanding performance.

(b) An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory."

4305. Review of ratings.

(a) "An agency, on request of an employee of that agency, shall provide one impartial review of the performance rating of the employee...

(c) In addition to the review under subsection (a) of this section, an employee with a current performance rating of less than satisfactory, on written appeal to the chairman of the appropriate board of review established under subsection (b) of this section, is entitled to a hearing and decision on the merits of the appealed rating;..."

4306. Performance-rating plans; inspection of.

(a) "the Civil Service Commission shall inspect the administration of performance-rating plans by each agency to determine compliance with the requirements of this chapter and the regulat-

ions prescribed thereunder.

(b) When the Commission determines that a performance-rating plan does not meet the requirements of this chapter and the regulations prescribed thereunder, the Commission after notice to the agency giving the reasons, may revoke its approval of the plan. After revocation, the performance-rating plan and any current ratings thereunder are inoperative and the agency thereafter shall use a performance-rating plan prescribed by the Commission."

4307. Other rating procedures prohibited.

"An employee may not be given a performance rating, regardless of the name given to the rating, and a rating may not be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as meeting the requirements of this chapter."

5. Classification Act of October 28, 1949 (pp. 279-292, 1970 Edition of U.S. C., 5 U.S.C. 5101 et. seq.):

This Act is too lengthy to set forth verbatim.

In pertinent summary, these statutes set forth the basis for establishing the classification and qualification standards for all positions in the Federal Service as come under the Civil Service

Commission's jurisdiction. (It is specially alleged in the complaints that Nouse did not meet the Classification and Qualification Standards under this Act.)

6. Judicial Review (p. 196, 197, 1970 Edition of U.S.C. 5 U.S.C. 701 et. seq.), Administrative Procedure Act.

704. Actions reviewable.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purpose of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

706. Scope of review.

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law. Interpret constitutional and applicability of the terms of an agency action. The reviewing court shall--

(I) compel agency action unlawfully withheld or unreasonably delayed: and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law:

(B) contrary to constitutional right, power, privilege, or immunity:

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right:

(D) without observance of procedure required by law:

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this tital or otherwise reviewed on the record of an agency hearing provided by statute: or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 76-1313 September Term, 1976

Bartholomew Mandel, et al.,
Appellants,
v.
Martin R. Hoffman, Secretary of the Army, et al.

Civl Action No. 75-0861

Before: Bazelon, Chief Judge; McGowan and MacKinnon, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellants, it is

ORDERED by the Court that appellants' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Filed Apr. 21, 1977

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 76-1313 September Term 1976

Bartholomew Mandel, et al., Appellants,
v.
Martin R. Hoffman, Secretary of the Army, et al.

Civil 75-0861

Appeal from the United States District of Columbia

Before: BAZELON, Chief Judge, McGOWAN and MacKINNON, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

George A. Fisher
Clerk

Filed Mar. 23, 1977

MEMORANDUM

The present appeal comes at the end of a long history of litigation and review of appellants' discharges from the United States Army Tank-Automotive Command, Warren, Michigan. Appellant Mandel was discharged on May 23, 1973, and appellant Thomas on July 30, 1973, for inefficiency as mechanical engineers. The discharges were in keeping with the performance rating-plan developed by the Tank-Automotive Command, pursuant to 5 U.S.C. §§ 4302-04 (1970), and followed the mandatory 90-day warning period for such personnel actions.

During this 90-day period, appellant Mandel brought suit against his immediate supervisor (Nouse) and, following the discharge, joined the commander of the installation (Pieklik) as well. The lawsuit was commenced in the United States District Court for the Eastern District of Michigan. It alleged procedural errors leading to a denial of due process and first amendment rights.

On November 12, 1973, the Eastern District dismissed with prejudice, on grounds of sovereign immunity, that part of the suit seeking damages; and dismissed, without prejudice, that part of the suit seeking equitable relief. The dismissal of the claim for reinstatement and declaratory relief was on the basis of failure to exhaust administrative

remedies--the investigation by the Field Office of the Federal Employee Appeals Authority had not yet been completed, let alone an appeal taken to the U.S. Civil Service Commission Appeals Review Board.

The Sixth Circuit affirmed the District Court's disposition of appellants' complaint in Mandel v. Nouse, 509 F.2d 1031 (6th Cir. 1975). The court held that sovereign immunity was a defense to the damages claim, that appellants' allegation of denial of procedural due process for failure to hold a pre-termination hearing was not cognizable after Arnett v. Kennedy, 416 U.S. 134 (1974), and that primary jurisdiction lay in the United States Civil Service Commission, so that administrative remedies would have to be exhausted before any more proceedings in federal court.

The appellants had sued Howard Callaway, then Secretary of the Army, as an additional defendant. On April 25, 1975, two months after the Sixth Circuit opinion, the United States District Court for the Eastern District of Michigan dismissed that complaint as well, ruling that res judicata from the suit against Nouse and Pieklik foreclosed the questions of sovereign immunity and the issue of a pre-termination hearing. (Appellants had been given a full post-termination hearing.) Although the Federal Employee Appeals Authority Field Office had issued its findings upholding the termination on August 6, 1974 (and

the Civil Service Commission Appeals Review Board had sustained that decision on December 24, 1975) appellants had not alleged this exhaustion of administrative remedies. Hence, the same logic and disposition of the suit involving Nouse and Pieklik was applicable to the action against Callaway.

One month after the decision by the U.S. District Court in Michigan, appellants filed the instant action in the U.S. District Court for the District of Columbia. Exhaustion of remedies was alleged, and is not contested. On June 23, 1975, appellants moved to amend the complaint to charge that the discharges had been arbitrary and capricious--for the first time focusing on the substance of the discharge decision rather than alleged procedural errors. Appellees moved to dismiss for res judicata or, in the alternative, for summary judgment on the merits. On January 30, 1976, that motion was granted, without opinion, by Judge Aubrey Robinson.

The procedural failures alleged by appellants in the agency hearing and their first amendment claim were before the U.S. District Court in Michigan. Res judicata bars their relitigation here. One of the named defendants (Hampton) is new, but the complaint is still in essence against the government, and privity is clear. All that remains to be resolved is the substantive challenge to the discharges as being arbitrary and capricious. There, even though

this court is not taking the matter on direct appeal from an agency, but after proceedings in the district court, the standard of review is set forth by the Administrative Procedue Act, 5 U.S.C. 706 (2) (E): "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . ."

The decisions by the United States Civil Service Commission Appeals Review Board in the cases of Mandel and Thomas, on December 24, 1974, canvas the evidence of inefficiency in light of the agency's legitimate need for standards of performance. Very little direct evidence was introduced by appellants to demonstrate their engineering proficiency in their positions with the Army Tank-Automotive Command to rebut the conclusions of their immediate supervisors. The Appeals Review Board received all of the evidence on this question and evaluates it in a manner that cannot be called improper by a reviewing court. There being substantial evidence for the adjudication of appellants' claim by the Appeals Review Board, the dismissal of their complaints is affirmed on the basis of the findings made there.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bartholomew Mandel, et al., Plaintiffs, v. Howard H. Callaway, et al., Defendants.	CIVIL ACTION NO. 75-0861

ORDER

UPON CONSIDERATION of defendants' motion to dismiss or in the alternative for summary summary judgment, the complaint, and the entire record in this cause, it is by the Court this 30th day of January, 1976

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment be, and it hereby is, granted; and it is

FURTHER ORDERED that this action be, and it hereby is, dismissed.

(s)Aubrey E. Robinson, Jr.
UNITED STATES DISTRICT JUDGE

Filed Jan. 30, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARTHOLOMEW MANDEL and
HARRY THOMAS,

Plaintiffs,

v.

HOWARD H. CALLAWAY,
Secretary of the Army,
Constituting the
UNITED STATES DEPARTMENT
OF THE ARMY

and

ROBERT E. HAMPTON,
Chairman, constituting
the UNITED STATES CIVIL
SERVICE COMMISSION, the
UNITED STATES,

defendants

CIVIL ACTION
NO. 75-0861

Filed: May 27, 1975

COMPLAINT

1. This is an action for judicial review of plaintiffs' discharges from the Federal Service effected by the Department of the Army on May 23, 1973, (Mandel) and July 20, 1973 (Thomas).

2. Further, this is an action requesting this Court to issue orders in the nature of mandamus directing defendants to reinstate plaintiffs to their quandam positions in the United States Army Tank-Automotive Command (USATACOM), Warren, Michigan, with full back pay, other benefits and costs pursuant to 5 U.S.C. 5596 and 28 U.S.C. 1361. A declaratory judgment is also requested defining the rights of plaintiffs.

3. The jurisdiction of the Court arises under 28 U.S.C. 1331, 1361, 2201 and 2202, and 5 U.S.C. 551-559, 701-706 4301 et seq., 5101 et seq., 5596, and 7501, Ex. Ord. 11491 Sec. 22, and U.S. constitutional amendments I, V, and XIV.

4. Plaintiffs are citizens of the United States and occupied permanent competitive service positions with USATACOM as GS-13 Mechanical Engineers.

5. Plaintiff Mandel is an honorably discharged veteran of the Armed Forces of the United States, having served for four plus years in battle areas during World War II and the Korean War.

6. Plaintiffs have acquired permanent status and as such may not be removed, separated, demoted, reduced in rank or compensation, or adversely affected, except for such cause as will promote the efficiency of the service, and only after the service of written charges which must set forth specifically, competently and in detail the reasons for the adverse action.

7. Plaintiffs have rendered honest, faithful and diligent service. At no time have they been insubordinate or incompetent. Their services have at all times been exemplary.

8. Plaintiffs have joined in this action because of common questions of law and fact, and to avoid a multiplicity of lawsuits.

9. Prior to May 23, 1973, and July 20, 1973, respectively, plaintiffs Mandel and Thomas were permanently employed by USATACOM as GS-13 Mechanical Engineers in Systems Analysis Division (SAD). Their first, second and third-line supervisors were Joseph O. Nouse, Orlando Garcia and Joseph E. Pieklik, respectively.

10. On October 30, 1972, plaintiffs were advised by letters signed by Nouse, purportedly acting in official capacity for the United States Army Tank-Automotive Command (USATACOM), Warren, Michigan, that plaintiffs' job performance since January 1, 1972, were "deficient". The sole basis for the charges was the allegation that plaintiffs had not met

the requirements of (a) a non-existent performance-rating plan (prior to April 21, 1972), and (b) a patently illegal and fraudulent "plan" established by Nouse on April 21, 1972. Three frivolous, false, and incompetent charges were also applied to plaintiff Thomas.

11. The letters warned plaintiffs that if their job performances did not "improve" to meet the requirements of the "plan" within 90 days, that an adverse action, including discharge, would be initiated. The letter prejudicially forecast that "more than 90 days will be required".

12. In accordance with the prejudicial forecast, plaintiffs were subsequently informed that they had failed to "improve" within the 90-day period.

13. Subsequently they were served with "30-day letters" containing charges of "inefficiency," etc. and proposals for discharge of plaintiffs, based on said illegal performance rating plan.

14. Plaintiffs were given the right to reply and they did so. However, based on the Agency's denial of plaintiffs' requests for answers to bills of particulars and access to evidence in the Agency's files bearing on their innocence or guilt, the replies were not "fully evidentiary".

15. Although plaintiffs' replies contained allegations as to the decision-maker's wrongdoing, decision-making officer, Pielkik, did not disqualify himself, but elected to issue decisions

to discharge plaintiffs.

16. As a result of these prejudicial decisions, rendered by a decision-maker who was not impartial, plaintiff Mandel was discharged on May 23, 1973, and plaintiff Thomas was discharged on July 30, 1937.

17. Previous to the charges of "inefficiency", plaintiffs were the "workhorses" of the department, but were treated as fifth-class civil service employees. They each had a previous thirty-year plus career of satisfactory performance in the fields of electrical and mechanical engineering.

18. Plaintiffs have exhausted all administrative remedies and administrative appeals, including an optional appeal to the Civil Service Commission itself.

COUNT I

19. The Agency (USATACOM), Department of the Army, noted unconstitutionally and illegally and prejudicially erred in effecting the discharges of plaintiffs, viz.:

a. By denying due process and equal protection of the laws to plaintiffs prior to and during the termination procedures.

b. By depriving plaintiffs of important constitutional

and statutory rights prior to and during the termination procedures.

c. By depriving plaintiffs of the right to make a fully-evidentiary reply to the charges by failing to answer requests for bills of particulars and withholding evidence in its files bearing on the guilt or innocence of plaintiffs.

d. By knowingly permitting the termination proceedings to be adjudicated by officers who had wilfully, deliberately and maliciously stepped outside the "outer perimeter of their line of duty" to effect the discharge of plaintiffs and hence acted outside their official capacities as officers of the government.

e. That defendant Department of the Army effected the discharges of Plaintiff in bad faith.

COUNT II

20. The Civil Service Commission acted unconstitutionally and illegally, and prejudicially erred in conducting the post-termination hearings and in reviewing the evidence and arguments submitted in the cases, viz.:

a. By making prejudicial and unlawful rulings prior to and during the hearings which barred valid defenses set forth by plaintiffs and hence prevented plaintiffs from introducing evidence bearing on their innocence or guilt.

b. By supporting, by improper rulings, all of the unlawful and unconstitutional acts and prejudicial errors of the Agency, supra (COUNT I).

c. By wilfully, deliberately and maliciously failing to adhere to the guidelines for review as set forth in 5 U.S.C. 706.

d. By wilfully, deliberately, maliciously, and unnecessarily extending the appeal procedure by ordering a "remand" hearing without instruction which continued all previous bars to said valid defenses and introduction of new evidence and arguments by plaintiffs all for the apparent purpose of placing additional duress and strain on plaintiffs in the pursuance of their appeal.

* * *

WHEREFORE, plaintiffs respectfully pray for the following relief:

A. That the determinations made by defendants be reversed, vacated and set aside;

B. That an order in the nature of Mandamus be issued directing defendants to reinstate plaintiffs with full rights and privileges, to their quondam positions, retroactively to the dates of their illegal discharges from USATACOM;

C. That an order in the nature of Mandamus be issued directing defendants to reimburse plaintiffs for their loss of salary and other benifits, pursuant to 5 U.S.C. 5596, during the period from their discharge to reinstatement, including interest and inflationary losses;

D. That an order in the nature of Mandamus be issued directing defendants to reimburse plaintiffs for their costs incurred in all legal proceedings related to this complaint;

E. That the adverse actions which separated plaintiffs from USATACOM be reviewed by this Court and then annulled, vacated and set aside upon the grounds that said determinations were illegal, unlawful, without basis in fact and law, and in excess of constitutional and statutory jurisdiction, authority, or limitations;

F. That a judicial declaration be made by this Court as to the rights of plaintiffs;

G. For such other, further, and different relief as to the Court may seem just and proper.

(S) Bartholomew Mandel
Plaintiff
5575 Woodland Pass
Birmingham, Michigan 48010
313-626-1413

(S) Harry Thomas
Plaintiff
65151 Wolcott Road
Romeo, Michigan 48065
313-752-3118

DATED: May 23, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bartholomew Mandel and Harry Thomas, Plaintiffs,	CIVIL
v.	ACTION
Howard H. Callaway, Secretary of the Army, et al.	NO. 75-0861
Defendants.	

AMENDMENT TO COMPLAINT

The following amendment is submitted, pursuant to Rule 15(a) of the F.R.C.P.

Add the following sub-paragraph to paragraph 19 under Count I of the Complaint:

"e. The discharge of plaintiffs from the Federal Service was arbitrary and capricious and was "cruel and unusual punishment", in the constitutional sense, as set forth in Amendment VIII of the Constitution."

(s) Bartholomew Mandel
Plaintiff

(s) Harry Thomas
Plaintiff

DATED: July 23, 1975

Filed: July 28, 1975

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

DECISION

IN THE MATTER OF)
) TYPE CASE:
Bartholomew Mandel) Removal

BEFORE: Roel, Jeffries and McDonald,
Board Members.

INTRODUCTION

The above-named appellant submitted an appeal from the August 6, 1974 decision of the Chicago Field Office of the Federal Employee Appeals Authority (FEAA) which sustained the action of the Department of the Army in removing him from the position of Mechanical Engineer, GS-13, at the U. S. Army Tank-Automotive Command, in Warren, Michigan, effective May 23, 1973.

STATEMENT OF THE CASE

By letter of March 22, 1973, appellant was notified of a proposal to remove him from the service based on charges of inefficiency. The charges were more specifically set forth in the following 12 pages of the advance notice. Appellant replied to the charges orally on March 30, 1973, and in writing, by letter of April 19, 1973. On May 9, 1973, the agency issued its decision to effect the removal as proposed, as the charges and supporting specifications were all found to be sustained by the evidence. Removal became effective on May 23, 1973.

Appellant submitted an appeal from the agency's decision directly to the Civil Service Commission. A hearing was conducted, but it ended before the presentation of all of the evidence on the facts of the case was heard because of appellant's use of a mechanical recording device after the hearing examiner had ruled that such a machine could not be used. On the basis of the evidence then in the record, the Chicago Regional Office issued a decision on November 9, 1973. That decision affirmed the agency's action, based on the findings that all of the mandatory procedural requirements of part 752, subpart B, of the Civil Service regulations were complied with in the proceedings leading to appellant's removal; that the agency proceeded against him on the basis of the adverse action regulations and accordingly did not have to follow the procedures required for a removal based on an unsatisfactory performance rating; that neither the qualifications of appellant's supervisor nor the ratings he gave to other Mechanical Engineers are pertinent to the case; that a decision on the appeal should not be delayed pending the outcome of the suit which had been filed in court against his supervisor; that the charge and supporting specifications are all sustained, with the exception of the specificatins contained in paragraph 11 of the letter of charges; and, that on the basis of all of these findings, removal was for such cause as would promote the efficiency of the service.

An appeal from this decision was taken to the Board of Appeals and Review (now the Appeals Review Board). By

decision of April 8, 1974, the Board rescinded the decision of the Regional Office and remanded the case to afford appellant another opportunity to present evidence relative to the merits of the appeal which had not been brought out at the aborted hearing.

FIRST LEVEL DECISION

On May 13, 1974, a second hearing was held at the Regional Office (now the Chicago Field Office of the FEAA). Following the hearing, on August 6, 1974, the Field Office issued a decision which found that there was no need to delay the adjudication of the case in order to await the board's action on a request appellant had made to it to clarify the basis for the remand and to set forth certain rules for the conduct of the hearing; that the evidence had been thoroughly reviewed on the first adjudication of the appeal by the Field Office; that no new evidence was presented at the second hearing; and, that accordingly, nothing new was brought out which would change the findings of the first decision, so that the removal should be sustained.

REPRESENTATIONS TO THE BOARD

In appealing his case to the Board, appellant contends that the Board's failure to issue a more instructive remand order prejudiced him by not overruling the Field Office's earlier rulings on requests he had made; that the Field Office's decisions had barred all prepared defenses he had as being to germane to the appeal; that in spite of these pre-

judicial rulings, there is sufficient evidence in the record to find that appellant's supervisor was not qualified to judge him as a professional mechanical engineer; and, that his constitutional rights have been disregarded in the processing of the appeal. The agency, given the opportunity to respond to appellant's contentions, did so by letter of October 18, 1974, in which it stated that appellant was given a new opportunity by the remand for a review of the merits of his case and that he refused to use it although all of the witnesses of importance were present and ready to testify if asked.

ANALYSIS AND FINDINGS

Having fully reviewed the appellate record, the Board agrees with the Commision's Field Office that the agency complied with the procedural requirements of part 752, subpart B, of the Civil Service regulations in the proceedings leading to appellant's removal.

An issue which appellant has raised from the beginning is that the agency did not comply with the requirements of 5 USC 4301 et seq. and 5 USC 5101et seq., relative to performance rating reviews and that such non-compliance has denied him his constitutional rights. Based upon its review of this matter, the Board finds that because of the fact that appellant was not removed due to an unsatisfactory performance rating, but rather for the inefficiencies specifically related in the letter of charges, the agency's failure to comply with the cited provisions of the U.S. Code does not affect the validity of its action. In the case of

Misuraca v. United states, 135 Ct. Cl. 387 (1956), the employee was removed for, among other charges, inefficiency. There, the court held that the sections of the U. C. C. to which appellant referred, "are not applicable in the instant case because charges were preferred for her removal for cause and the question of a review of her efficiency rating was not involved. A rating of 'satisfactory' does not preclude a dismissal for cause." Further, in Monday v. United States, 146 Ct. Cl. 6 (1962), cert denied 361 U.S. 965, rehearing denied 362 U.S. 945, where the employee was dismissed for inefficiency, the court held that:

> A dismissal of a civilian Government employee under the provisions of the Lloyd-LaFollette Act of 1912 . . . need not satisfy the procedural requirements of the Performance Rating Act of 1950 . . . .

A second assertion appellant has made throughout the course of his appeal is that he should have been allowed access to the personnel records of his supervisor to prove that he was incompetent to judge his performance and to the performance ratings of other employees to prove that the supervisor gave others better ratings because they were his personal friends. The Field Office held that the agency's refusal to allow appellant's review of these materials was not error since the materials had no direct bearing on the charges in question. The Board has reviewed the record relative to this issue and concurs in the Field Office's determination.

When appellant first raised this issue to the Field Office, he was informed that the qualifications of his supervisor and the supervisor's superiors are not pertinent to his case, but that "If you are charged with specific matters, the correctness or incorrectness of the indivdual matters is a question of proof. Management has the burden of proving each specification of each charge it placed against you." (Letter of September 11, 1973, from the Field Office.) This indicstes that while the general qualifications of these persons are not at issue in the appeal, as they relate to specific charges and specifications listed appellant would have the opportunity to present evidence and cross examine witnesses. The same point was made more clearly at the hearing of September 5, 1973, where the issue of the qualifications of these men came. There, the hearing examiner stated that". . . apparently this is directed toward evidentiary matters . . . that relate to the merits of this case, which as you know, is the subject of this hearing." (Transcript, page 51.) Again, the examiner stated that he would be in a better position to judge the evidence relative to this issue after the hearing had produced testimony on which to base a decision and that evidence would be accepted in the form of testimony which might "alter or refute the documents" that are in the record. (Transcript, page 52.)

Based upon the above, while it is true, as appellant states, that the Commision has indicated that the qualifications of each individual he referred to are not at issue, it did not totally

foreclose the issue of qualifications as it directly relates to the charges and specifications against him. Nothing in the record indicates that appellant would have been foreclosed from questioning his supervisor or any other as to his ability to judge whether appellant's conduct in any specific instance was acceptable or not. The witnesses appellant requested were present at the hearings held in this matter and could have been called by him and examined with reference to their ability to recognize an inefficiency or cross examined on that topic after the witness was examined by the agency's representative. Instead of doing so, however, appellant chose not to present any evidence relative to this issue, but to present his argument in the form for summary judgment, before any testimony or evidence had been introduced, and to not pursue the matter further when his motion was overruled by the examiner in favor of a decision on the matter at a later date when all of the evidence on the issues, including competence, was in. For these reasons, the Board finds no error in the Field Office' handling of this issue.

On the merits of the case itself, little evidence has been introduced by appellant other than his denial and the specific "affirmative defenses" cited above. Based upon a review of the record, the Board finds that the decision of the Field Office on the merits of the charges and specifications is supported by substantial evidence and should be affirmed. The Field Office's first decision, dated November 9, 1973, went into great detail on the evidence that is present in the file, and the Board adopts its analysis

and findings as correct. Although appellant has alleged that a fraudulent conspiracy to get rid of him existed at the agency, no evidence that this is the case appears in the record. Similarly, although he alleges that his supervisor was incapable of judging his work, the evidence indicates that the supervisor has been a supervisor for 25 years (hear- of May 13, 1974, page 34.) Further, although appellant is a mechanical engineer and his supervisor is not, the record indicates that appellant's work was largely directed toward providing the technical support for cost studies as to whether a particular project would be fiscally feasible. Since the supervisor's field of expertise was economics before he had job experience in the specific area in which he is now working, the record thus indicates that the supervisor was qualified to make judgments as to whether appellant's work met the needs of the department, even assuming that he could not state whether one engineering technique was technically more sound than another. More important, however, is the fact that all of the charges against appellant do not relate strictly to technical matters. Some relate to missed deadlines, failure to display a cooperative attitude, failure to adhere to established requirements, and failure to accept responsibility, among others, matters which do not require that one making charges thereon have any technical competence at all. Since appellant has chosen to introduce no evidence on these issues beyond the denials contained in his written reply to the charges, the Board has reviewed the evidence of record and finds that the agency has supported its charges by the preponderance of the evidence. No

evidence has been introduced to contovert the agency's documentation given in support of the charges. Since that documentation fully supports the charges and specifications, the Board concurs in the decision of the Field Office that the charges are sustained.

Based upon the sustained charges and the lack of any mitigating circumstances in the record, the Board finds that appellant's removal was not arbitrary or capricious, but was for such cause as will promote the efficiency of the service.

DECISION

Accordingly, the Chicago Field Office decision of August 6, 1974, is hereby affirmed.

Civil Service regulations provide that decisions of the Board are final and there is no right of further administrative appeal.

For the Commissioners:

(s) William P. Berzak
Chairman

December 24, 1974

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

DECISION

IN THE MATTER OF)
)
Harry Thomas)

TYPE CASE:
Removal

INTRODUCTION

The above-named appellant submitted an appeal from the August 6, 1974 decision of the Chicago Field Office of the Federal Employee Appeals Authority (FFAA) which sustained the action of the Department of the Army in removing him from the position of Mechanical Engineer, GS-13, at the U.S. Army Tank-Automotive Command, in Warren, Michigan, effective July 20, 1973.

STATEMENT OF THE CASE

By letter of May 18, 1973, appellant was notified of a proposal to remove him from the service based on four charges: inefficiency; deliberate failure to work on an assigned project; failure to obey direction from the proper authority; and making unsubstantiated defamatory statements about fellow-employees with intent to harm or destroy their reputation, authority, or official standing. The charges were more specifically set forth in the advance notice, which consisted of 16 pages.

Appellant submitted a written reply

to the charges, with enclosures, by letter of June 29, 1973. On July 17, 1973, the agency issued its decision to effect the removal as proposed, as the charges and supporting specifications were all found to be sustained by the evidence. Removal became effective on July 20, 1973.

Appellant submitted an appeal from the agency's decision directly to the Civil Service Commission. A hearing was conducted, but it ended before the presentation of all of the evidence on the facts of the case was heard because of appellant's use of a mechanical recording device after the hearing examiner had ruled that such a machine could not be used. On the basis of the evidence then in the record, the Chicago Regional Office issued a decision on December 13, 1973. That decision affirmed the agency's action, based on the findings that all of the mandatory procedural requirements of part 752, subpart B, of the Civil Service regulations were complied with in the proceedings leading to appellant's removal; that the agency proceeded against him on the basis of the adverse action regulations and accordingly did not have to follow theprocedures required for a removal based on an unsatisfactory performance rating; that neither the qualifications of appellant's supervisor nor the ratings he gave to other Mechanical Engineers are pertinent to the case; that a decision on the appeal should not be delayed pending the outcome of the suit which appellant had filed in court against his supervisor; that the charges and supporting specifications were all sustained; and, that on the basis of all these findings, removal was for such cause as would promote the efficiency of the service.

An appeal from this decision was taken to the Board of Appeals and Review (now the Appeals Review Board). By decision of April 8, 1974, the Board rescinded the decision of the Regional Office and remanded the case to afford appellant another opportunity to present evidence relative to the merits of the appeal which had not been brought out at the aborted hearing.

FIRST LEVEL DECISION

On May 13,1974, a second hearing was held at the Regional Office (now the Chicago Field Office of the FEAA). Following the hearing, on August 6, 1974, the Field Office issued a decision which found that there was no need to delay the adjudication of the case in order to await the Board's action on a request appellant had made to it to clarify the basis for the remand and to set forth certain rules for the conduct of the hearing; that the evidence had been thoroughly reviewed on the first adjudication of the appeal by the Field Office; that no new evidence was presented at the second hearing; and, that accordingly, nothing new was brought out which would change the findings of the first decision, so that the removal should be sustained.

REPRESENTATIONS TO THE BOARD

In appealing his case to the Board, appellant contends that the Board's failure to issue a more instructive remand order prejudiced him by not overruling the Field Office's earlier rulings on requests he had made that the Field Office's

decisions had barred all prepared defenses he had as being not germane to the appeal; that in spite of these prejudical rulings, there is sufficient evidence in the record to find that appelant's supervisor was not qualified to judge him as a professional mechanical engineer; and, that his constitutional rights have been disregarded in the processing of the appeal.

The agency, given the opportunity to respond to appellant's contentions, did so by letter of October 18, 1974, in which it stated that appellant was given a new opportunity by the remand for a review of the merits of his case and that he refused to use it although all of the witnesses of importance were present and ready to testify if asked.

ANALYSIS AND FINDINGS

Having fully reviewed the appellate record, the Board agrees with the Commission's Field Office that the agency complied with the procedural requirements of Part 752, subpart B, of the Civil Service regulations in the proceedings leading to appellant's removal.

An issue which appellant has raised from the beginning is that the agency did not comply with the requirements of 5 USC 4301 et seq. and 5 USC 5101 et seq., relative to performance rating reviews, and that such non-compliance has denied him his constitutional rights. Based upon its review of this matter, the Board finds that because of the fact that appellant was not removed due to an unsatisfactory performance rating, but rather for inefficiency and other reasons, the agency's

failure to comply with the cited provisions of the U.S. Code does not affect the validity of its action. In the case of Misuraca v. United States, 135 Ct. Cl. 387 (1956), the employee was removed for, among other charges, inefficiency. There, the court held that the sections of the U.S.C. to which appellant referred, "are not applicable in the instant case because charges were preferred for her removal for cause and the question of a review of her efficiency rating was not involved. A rating of 'satisfactory' does not preclude a dismissal for cause." Further, in Monday v. United States, 146 Ct. Cl. 6 (1962), cert. denied 361 U.S. 965, where the employee was dismissed for inefficiency, the court held that:

> A dismissal of a civilian Government employee under the provisions of the Lloyd-LaFollette Act of 1912 . . . need not satisfy the procedural requirements of the Performance Rating Act of 1950 . . . .

A second assertion appellant has made throughout the course of his appeal is that he should have been allowed access to the personnel records of his supervisor to prove that he was incompetent to judge his performance and to the performance ratings of other employees to prove that the supervisor gave others better ratings because they were his personal friends.

The Field Office held that the agency's refusal to allow appellant's review of these materials was not error since the materials had no direct bearing on the charges in question. The Board has reviewed the record relative to this issue

and concurs in the Field Office's determination.

When appellant first raised this issue to the Field Office, he was informed that the qualifications of his supervisor and the supervisor's superiors are not pertinent to his case, but that"If you are charged with specific matters, the correctness or incorrectness of the individual matters is a question of proof. Management has the burden of proving each specification of each charge it placed against you." (Letter of September 11, 1973, from the Field Office.) This indicates that while the general qualifications of these persons are not at issue in this appeal, as they relate to specific charges and specifications listed, appellant would have the opportunity to present evidence and cross-examine witnesses. The same point was made more clearly at the hearing of a former fellow-employee which took place 15 days before appellant's, where appellant was the other's representative, and where almost exactly the same issues were discussed. There, when the issue of the qualifications of these men came up, the hearing examiner stated that ". . . apparently this is directed toward evidentiary matters . . . that relate to the merits of this case, which as you know, is the subject of this hearing." (hearing re Bartholomew Mandel, September 5, 1973, page 51.) Again, the examiner stated that he would be in a better position to judge the evidence relative to this issue after the hearing had produced testimony on which to base a decision and that evidence would be accepted in the form of testimony which might "alter or refute the documents" that are in the record. (Hearing, supra at 52.)

Based upon the above, while it is true, as appellant states, that the Commission has indicated that the qualifications of each individual he referred to are not at issue, it did not totally foreclose the issue of qualifications as it directly relates to the charges and specifications against him. Nothing in the record indicates that appellant would have been foreclosed from questioning his supervisor or any other as to his ability to judge whether appellant's conduct in any specific instance was acceptable or not. The witnesses appellant requested were present at the hearings held in this matter and could have been called by him and examined with reference to their ability to recognize any inefficiency or cross-examined on that topic after the witness was examined by the agency's representative. Instead of doing so, however, appellant chose not to present any evidence relative to this issue, but to present his argument in the form of a motion for summary judgment, before any testimony or evidence had been introduced, and to not pursue the matter further when his motion was overruled by the examiner in favor of a decision on the matter at a later date when all of the evidence on the issues, including competence, was in. For these reasons, the Board finds no error in the Field Office's handling of this issue.

On the merits of the case itself, little evidence has been introduced by appellant other than his denial and the specific "affirmative defenses" cited above. Based upon a review of the record, the Board finds that the decision of the Field Office on the merits of the charges and specifications is supported by

substantial evidence and should be affirmed. The Field Office's first decision, dated December 13, 1973, went into great detail on the evidence that is present in the file, and the Board agrees with and adopts its analysis and findings. Although appellant has alleged that a fraudulent conspiracy to get rid of him existed at the agency, no evidence that this is the case appears in the record. Similarly, although he alleges that his supervisor was incapable of judging his work, the evidence indicates that the supervisor has been a supervisor for 25 years (Second Madel hearing, May 13, 1974, page 34.) Further, although appellant is a mechanical engineer and his supervisor is not, the record indicates that appellant's work was largely directed toward providing the technical support for cost studies as to whether a particular project would be feasible. Since the supervisor's field of expertise was economics before he had job experience in the specific area in which he is now working, the record thus indicates that the supervisor was qualified to make judgments as to whether appellant's work met the needs of the department, even assuming that he could not state whether one engineering technique was technically more sound than another. More important, however, is the fact that all of the charges against appellant do not relate strictly to technical matters. Some relate to missed deadlines, failure to work on a project, failure to obey directions, and to making unsubstantiated, defamatory remarks, matters which do not require that the one making charges thereon have any technical competence at all. Since appellant has chosen to introduce no evidence on these

issues beyond the denials contained in his written reply to the charges, the Board has reviewed the evidence of record and finds that the agency has supported its charges by the preponderance of the evidence. No evidence has been introduced to controvert the agency's documentation given in support of the charges. Since that documentation fully supports the charges and specifications, the Board concurs in the decision of the Field Office that the charges are sustained.

Based upon the sustained charges and the lack of any mitigating circumstances in the record, the Board finds that appellant's removal was not arbitrary or capricious, but was for such cause as will promote the efficiency of the service.

DECISION

Accordingly, the Chicago Field Office decision of August 6, 1974, is hereby affirmed.

Civil Service regulations provide that decisions of the Board are final and there is no right of further administrative appeal.

For the Commissioners:

(s)
William P. Berzak
Chairman

December 24, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bartholomew Mandel and Harry Thomas, Plaintiffs, v. Howard H. Callaway, Secretary of the Army, constituting the United States Department of the Army and Robert E. Hampton, Chairman, constituting the United States Civil Service Commission, the United States, Defendants.	CIVIL ACTION NO. 75-0861 Filed: Nov. 24, 1975

RESPONSE TO DEFENDANTS'
"MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT"
and
OBJECTION TO THE RECORDS

Motion to Dismiss

Defendants base their Motion to Dismiss on the ground that the action is barred by the application of the doctrine of res judicata.

The ground for this motion is clearly erroneous and unsupported and is in the nature of being frivolous.

Defendants, in support of their motion, refer to seven civil action cases previously filed by plaintiffs in the United States District Court, Eastern District of Michigan, to wit:

(1) Mandel v. Nouse C.A. 39861
(2) Mandel v. Pieklik C.A. 4-70025
(5) Thomas v. Nouse C.A. 39182
(7) Thomas v. Nouse C.A. 4-70492

The above cases are similar in that they are actions against Nouse and Pieklik, as individuals, for defamation of plaintiffs' reputations. The United States was not a defendant in any of the actions and no claim for relief was directed against the United States for reinstatement, back pay, or otherwise.

(4) Thomas v. Froehlke C.A. 39153

The above citation is purely frivolous. This case is based on a separate and distinct cause of action which occurred in 1968 and bears no relationship to the present cause of action which occurred in the approximate time period of 1972-1973.

(3) Mandel v. Callaway C.A. 40237
(6) Thomas v. Callaway C.A. 40287

The above cases are similar. Both are directed against the United States and seek relief in the way of reinstatement and back pay, based on violations of important constitutional and statutory rights of plaintiffs.

Defendants' statement to the effect that all of the above actions were "based essentially upon the removal action" is misleading, if not erroneous. (Page 2, 1st paragraph of defendants' motion). Although the removal actions were involved this issue was never litigated by the courts but was dismissed based on the doctrine of failure of plaintiffs to

exhaust their administrative remedies. (See page 8, Defendants' Exhibit 1).

In fact, the opinion of the District Court states that:

> "Plaintiff, of course, may seek judicial review of any decision by the Civil Service Commission if he so desires." Id. page 8.
>
> "When a prior action is adjudicated in part on the merits, its res judicata effect extends only to the portion so concluded" (Page 6, defendants' Exhibit 3) Mandel v. Nouse and Pieklik, supra).
>
> "However, the decision regarding plaintiff's claims for equitable and injunctive relief is more problematic. The Court in Nouse (Exhibit 1, supra) characterized exhaustion of remedies as grounds for dismissal without prejudice. . . Nevertheless, it does create a direct estoppel. Id, page 7."

The bar of "direct estoppel" has been removed in the instant action by reason of plaintiffs having now exhausted all administrative remedies.

In Thomas v. Callaway, the District Court's dismissal of the discharge issue parallels the above opinions, to wit:

> "It also seems clear that plaintiff's failure to exhaust his administrative remedies constitutes a bar to bringing of this action." (Defendants' Exhibit 5, page 4.)

Contrary to defendants' contention in footnote 2/ on page 2 of their "Memorandum of Points and Authorities . . .", the 6th Circuit Court of Appeals affirmed the lower court's opinions, to wit:

> "We further agree with the District Court that plaintiffs have not exhausted their administrative remedies before the United States Civil Service Commission which has primary jurisdiction." Mandel et al. v. Nouse et al., 509 F. 2d at 1033.

The only issues decided by the cited cases were (1) pretermination hearing, (2) sovereign or executive immunity, and (3) "primary jurisdiction." None of which are at issue in the instant action.

Defendants' Motion for Summary Judgment

Defendants' in support of their Motion for Summary Judgment, merely cite the decisions of the Civil Service Commission and contend that said decision "was not arbitrary, capricious or unsupported by substantial evidence."

Plaintiffs deny defendants' contention and further state that the decisions were violative of virtually every element of judicial review as set forth in 5 U.S.C. 706.

In support of their allegations in the complaint and as part of their Response to defendants' motion, plaintiffs are submitting a Cross-Motion for Summary Judgment with the conclusion that summary judgment should be granted in plaintiffs' favor.

OBJECTION TO THE RECORD

Plaintiffs hereby file an objection to the so-called "records" as filed by the defendants in this case for the following reasons:

1. In a case involving discharges of plaintiffs for "inefficiency", the "records" filed by defendants are an outstanding example of "inefficiency," on the part of defendants.

2. No conceivable order has been used by defendants in the arrangement of the papers in the record, chronological, or otherwise. The order used may best be described as "hodge-podge."

3. Many of plaintiffs papers have been scattered in nondescript order throughout the "records."

4. Many papers that plaintiffs, to their information and belief, have never been seen before by plaintiffs.

5. Papers referencing attachments or exhibits are separated from said attachments or exhibits.

6. Papers applicable to Mandel, notably Exhibit 7, Part III, pages 475-554, have been intermixed in Thomas' record. Many papers, applicable to both Mandel and Thomas have been omitted from the record.

7. Rough drafts of a portion of plaintiffs' work are included for no apparent reason. Final drafts have not been included.

8. The "records" in the cases were never identified prior to or during the Agency or Civil Service Commission proceedings. Plaintiffs were merely shown manilla folders containing a number of unbound papers which were not indexed. No copies or identifying index was ever furnished to plaintiffs.

In a case involving charges of inefficiency, the "Official Records" of the Civil Service Commission (Defendants' Exhibits 6 and 7) stand as mute evidence as to the inefficiency and inexpertise of the Commission.

The "Official Records of the Department of the Army (Investigative Reports) (Exhibits 6a and 7a) were never presented to plaintiffs for review until receipt of same on September 18, 1975.

(s)
BARTHOLOMEW MADEL
Plaintiff
5575 Woodland Pass
Birmingham, Mich 48010

(s)
HARRY THOMAS
Plaintiff
65151 Wolcott Road
Romeo, Mich 48065

DATED: November 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bartholomew Mandel,
Plaintiff,
vs.
Joseph O. Nouse,
Defendant.

CIVIL ACTION
NO. 39861

Bartholomew Manel,
Plaintiff,
vs.
Joseph E. Pieklik,
Defendant.

CIVIL ACTION
NO. 4-70025

JUDGMENT

These consolidated actions having come on for hearing before the Court on defendants' motions for summary judgment and the issues having been duly heard and a decision having been duly rendered:

IT IS ORDERED AND ADJUDGED that plaintiff's claims for money damages be dismissed on the merits with prejudice, and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's claims for injunctive and other equitable relief be dismissed without prejudice to his bringing a new action after exhaustion of administrative remedies.

Costs to defendant.

(s) Philip Pratt
United States District
Judge

Dated: Nov 8, 1973
Detroit, Michigan
(Underlining Added)

EXCERPTS FROM JUDGE PRATT'S MEMORANDUM

With respect to the claims for injunctive and other equitable relief, which are primarily asserted in Counts Two, Three and Four of the Mandel v. Nouse case, the Court believes that the nature of the relief sought indicates that plaintiff, in effect, seeks relief against the government under the doctrine evolved in Larson v. Foreign and Domestic Corp., 337 U.S. 682 (1949). Therefore, as noted in the opinion of this Court issued on May 17, 1973, plaintiff must show exhaustion of administrative remedies in order to obtain judicial review of agency action under 5 U.S.C. 704 (1970).

However, this Court concludes that plaintiff is not therefore presently entitled to judicial review of the various claims for injunctive and equitable relief brought in both cases.

An additional basis for denying review at this stage is that plaintiff has filed an appeal from his discharge with the Civil Service Commission. As noted above, the Commission must, in determining whether plaintiff's discharge was proper, review the sufficiency of the performance rating plan, the fairness of defendants' actions, and every other claim which plaintiff makes in these actions. In doing so, the Commission has the power to grant plaintiff essentially all the relief he seeks from this Court. Congress established the Commission with the intent that it would initially review all employee actions within the

federal service. It is noteworthy that the Commission has the specific statutory duty to review performance rating plans, such as the one at issue here, under 5 U.S.C. 4306 (1970). Accordingly, the Court holds that the Civil Service Commission has primary jurisdiction over the claims for injunctive or equitable relief presented in the complaint.

The Court believes that the Civil Service Commission should have the opportunity to apply its expertise in the complex administrative law issues involved in this case before review is granted by this Court. Plaintiff, of course, may seek judicial review of any final decision by the Civil Service Commission if he so desires. Accordingly, the claims for injunctive or equitable relief must be dismissed for plaintiff's failure to exhaust administrative remedies.

In summary, defendants' Motions for Summary Judgment are granted on all issues. Plaintiff's pending motions are denied.

IT IS SO ORDERED.

(s)
PHILIP PRATT
United States District
Judge

Dated: November 8, 1973
Detroit, Michigan

DEPARTMENT OF THE ARMY JOB DESCRIPTION

1. Installation or headquarters Office: U.S. Army Tank-Automotive Command
2. Job No. 14866-s
3. Citation to applicable standard and its date of issuance: CSC Oper Rsch Ser GS-1515, Jun 67; CSC SGEG, Part II, Feb 65
4. Title: Supervisory Operations Research Analyst
5. Pay Schedule: Class Act
6. Occ. Code: GS-1515 7. Grade: 15
8. Evaluation Approval: Title, pay schedule, code and grade of this job have been fixed in accordance with Department of the Army official policy and grade level standards.

Date: 9-14-71

9. Supervisory controls, duties and working conditions:

SUPERVISORY CONTROLS

Exercises delegated authority and responsibility for accomplishment of the Command mission and functions of System Analysis in terms of Department of the Army and Army Materiel Command policies. Within scope of broad policy and objectives established by higher echelons, maximum independence of action and freedom from technical control is provided to allow full scale analysis of vehicle systems, logistic systems, and management systems. Interpretations, recommendations and conclusions are authoritative, and impact, support, and influence management decisions through Department of Defense levels in determination of potential and/or actual effectiveness, performance,

availability and cost of defense mobility. Work is evaluated only on the basis of results and contributions toward achievement of overall goal of the Command mission.

MAJOR DUTIES

Serves as Chief of the Systems Analysis Division, and as principal advisor and consultant to the Commanding General, TACOM on vehicle, industrial, production, logistic and management systems operational analysis. Plans, directs, coordinates and controls programs to provide vehicle system operational research, analysis, and studies on life cycle basis from initial concept through disposal stages. Included are supporting and integral analyses of the significant variables including but not limited to short and long range considerations, subsystems, resources, support systems, etc. and involving all mission areas of TACOM. Systems analyzed and studies incorporate advanced state-of-the-art theory and methodology having knowledge gaps within the recognized academic disciplines of various sciences (physics, chemistry, metallurgy, mathematics, statistics, microbiology, economics, econometrics, and miltary science) and engineering, electronic, electrical, mechanical, chemical and industrial. Incumbent is responsible for development and implementation of analytical methodology and techniques to be used for collection, compilation, validation, analysis, synthesis, storage and use of data in developing simulated models, identifying variables, factors, and degrees of variable tolerance for individual factors, including those areas where extrapolation and validation of original raw source data is

required, i.e., cases where little or no empirical knowledge has previously existed. Studies, analyses, and evaluations form the basis for formulation or revising research, development, and/or engineering policy, plans and programs and for decisions to continue, modify, or eliminate marginal programs/projects and/or tasks. Work is directly concerned with top priority programs within the Department of Defense and is of highest importance to National Defense, requiring personnel of exceptionally high caliber with ability to perform original work. Incumbent gives direction to and controls work of a regular staff of approximately 15 Operations Research Analysts, Physicists, Mathematicians, and Engineers and has authority to request input data from various TACOM Directorates, Staff Offices, Project/Product Management Offices and contractors. Incumbent must possess executive abilities, marked creativity and scientific perception, and demonstrate achievement of a high level of professional recognition to assure cooperation and acceptance of evaluations, recommendations, presentations, and interpretation of programs to top levels of authority in the Department of the Army and in the Department of Defense.

1. Planning: Develops plans, policies, and procedures for providing scientific, technical and managerial objectives and guidance for accomplishment of assigned functions and responsibilities. Reviews and interprets basic policies of Office, Secretary of Defense, and other Government echelons. Establishes policy guidance in the form of overall work objectives, methods, processes, and procedures to assure accomplishment of

assigned functions and smooth workflow through the organization. Anticipates requirements by directing investigative studies in areas which might prove fruitful and lead toward significant improvements and advancing the state-of-the-art in vehicle/mobility systems. Continually probes and reviews the existing development programs in sufficient depth to isolate components or techniques that are less than optimum for the state-of-the-art in order to determine the need for further advanced development for those components and techniques. Plans, initiates, directs and coordinates programs involving the Research, Development and Engineering, Maintenance, Materiel Management, Product Assurance, Procurement and Production, Personnel, Training and Force Development Directorates and the Comptroller of the Command. Formulates long-range schedules and priorities, based upon consideration of assigned engineering functions, staffing, facilities, and equipment. Makes necessary adjustments in plans, schedules, priorities, and policy as changes in circumstances warrant. Makes technical and administrative decisions based on objectives, precedents, terms of assignments, time and cost limitations, urgency of requirements, etc. Plans for and determines what major projects should be initiated, dropped, or curtailed.

2. Direction: Directs the Division effort in accomplishing overall program objectives. Originates or reviews requests (Department of Defense-wide) for operations research, systems analysis and/or cost effectiveness on proposed and deployed vehicle systems against new recognized requirements and proposed modifications to increase cost effectiveness and

performance under specific operational conditions. Identifies or defines the problem and general methodology for solution using latest advancements in applicable fields of the sciences and engineering as guidelines which are often highly controversial. Identifies areas where guidelines are nonexistent, exercising originality, ingenuity, balance, judgment and professional competence in extrapolation of empirical knowledge to develop and/or validate guides for application in solving operational problems. Assigns projects and programs to subordinate team leaders, arranges for collaborative teams and renders consultant and advisory services as required. Guides, adjusts and supplements programs in light of current developments in objectives and advances in science and engineering and indicated future trends in the state-of-the-art. Initiates special studies to be performed by teams assembled from within the Systems Analysis Division and supplemented by engineering, scientific, and other research specialists selected for their special talents and level of expertise from other TACOM elements, and/or provided by higher authority and contractors. Investigates unusual conditions or situations detected by team research and conducts advanced and highly complex research studies and investigations of tactical and operation problems pertaining to vehicle, industrial, production, logistic and management systems.

3. Review: Makes continuing reviews of comprehensive technical and scientific reports and treaties prepared by subordinate teams, contractors and/or other Government Agencies and activities covering all phases of studies and investiga-

tions. Takes actions to exercise extreme care in the presentation of facts and data, as reports generally have national significance and are subject to critical review by higher echelon up to and including Office, Secretary of Defense. Reviews work to determine proficiency of individual employees and to assure proper utilization of skills and capabilities. Review and evaluates vehicle research and development progress in terms of US Army Combat Development Command, US Army Defense Command, US Army Continental Army Command tactical and operational requirements. Reviews siting, deployment, and production plans to make certain that the effectiveness of the system is not compromised. Reviews overall accomplishments to determine significant developments, trends, or areas that need redirection. Replans and reprograms the efforts of the Division to take advantage of significant developments, data, techniques, and theory in order to meet overall mission objectives.. Evaluates new developments and active programs for tactical and operational suitability in anticipation of similar assessment by Industry, CDC, CONARC, and Department of Transportation agencies.

4. Advisory, Consultant and Liaison Services: Serves as the top TACOM expert, advisor and consultant in the area of vehicle systems analysis and Operations Research and provides advice and information with respect to responsible program areas of threat analysis, systems requirements, systems analysis, risk analysis, and systems effectiveness for tactical, combat and commercial vehicle systems to key personnel within the Department of the Army, Department of De-

fense, Project Managers, contractors, AMC, key personnel ir educational institutions, and other governmental agencies and activities. Maintains effective relations with these groups to provide possible approaches to problems in light of the latest data, state-of-the-art, etc., in regard to assigned programs and functions. Decisions and recommendations are accepted as authoritative. In these contacts, incumbent is authorized to commit the organization, within broad policy established by higher authority, to reach agreements with groups from other agencies or organizstions, undertake new studies and investigations. Advises on practicality of further research and development as a means of overcoming tactical and/or operational problems. Recommends changes or revisions in programs relative to systems to assure coordination of development activities in conformance with military requirements. Provides assistance in the system life cycle management, including research, development contract definition, development and production, and operations and disposal phases, through analysis and synthesis to system problems, reaching conclusions and recommendations for presentation to the proper decision making authority. Prepares and collaborates in comprehensive technical and scientific reports covering all phases of investigations assigned or requested relating to command missions.

5. Is responsible for the execution of administrative and personnel management responsibilities related to the accomplishment of the mission assigned. Places exceptional emphasis on implementing and administering regulations governing the safeguarding of classified infor-

mation. Assures that subordinates are trained and fully comply with the provisions of security regulations. With the advice and assistance of personnel, manpower and management specialists, promotes sound position management principles and programs. Maintains management-employee communications by clearing up attitude problems; assists employees in improvement of performance and keeps them informed; and promotes team work. Administers discipline constructively and grants leave. Promotes acceptance and adherence to provisions of such programs as Equal Opportunity, Federal Women's Program, Physically Handicapped, Labor-Management Relations, and other similar emphasis programs. Assures adherence to supply, budget and safety programs and proper application of such programs.

Performs other duties as assigned.

10. Organization Location: Plans and Analysis Directorate, Systems Analysis Division